FILE COPY

Supreme Court
FILED
MAR 11 1
CHARLES

696

IN THE

Supreme Court of the United States

October Term 1935

CHICAGO GREAT WESTERN RAILROAD COMPANY, a corporation,

Petitioner,

vs.

MARY RAMBO, as administratrix of the Estate of ROY C. RAMBO, deceased,

Respondent.

BRIEF FOR PETITIONER.

HARRY S. STEARNS,
RALPH A. STONE,
PHILIP J. MACKEY,
Attorneys for Petitioner,
928-38 Minnesota Building,
St. Paul, Minnesota.

WALTER H. JACOBS,
Chicago, Illinois,
of Counsel.

A.

SUBJECT INDEX AND TABLE OF CASES.

		Page
B.	Official report of the opinion delivered by the Court below	1
C.	Grounds on which jurisdiction of the Court is invoked	2
D.	Statement of the case	5
E.	Specification of the assigned errors intended to be urged	8
F.	Argument	9

I.

No evidence to sustain a finding of violation of the Federal Boiler Inspection Act 9

II.

Even if the headlight were defective, it was not the proximate cause of the accident 13

III.

Negligence of deceased employe was sole proximate cause of his death 15

IV.

Conclusion 18

TABLE OF CASES CITED AND STATUTES.

Cases.	Page
Aerkfetz v. Humphreys, 145 U. S. 418, 36 L. Ed. 758	16
Atlantic Coast L. R. Co. v. Driggers, 279 U. S. 787, 73 L. Ed. 457, 49 Sup. Ct. Rep. 490	17
Bernola v. Penn R. Co., 68 Fed. (2d) 172	17
Boghich v. Louisville & N. R. Co., 26 Fed. (2d) 361	16
Chesapeake & Ohio R. Co. v. Nixon, 271 U. S. 218, 70 L. Ed. 914	16
Chicago, Milwaukee & St. P. R. Co. v. Coogan, 271 U. S. 472, 70 L. Ed. 1041	4, 15
Cincinnati &c. R. Co. v. Swann, 160 Ky. 458, 169 S. W. 886, L. R. A. 1915 C, 27	17
Connelly v. Penn R. Co., 228 Fed. 322	16
Davis v. Kennedy, 266 U. S. 147, 69 L. Ed. 212	15
Dozier v. Missouri Pac. R. Co., 176 Ark. 651, 3 S. W. (2d) 678	17
Frese v. C. B. & Q. R. R. Co., 263 U. S. 1, 68 L. Ed. 131	15
Great Northern R. Co. v. Wiles, 240 U. S. 444, 60 L. Ed. 732	15, 16
Greisch v. Mpls. St. P. & S. S. M. R. Co., 160 Minn. 83, 199 N. W. 517	17
May v. C. M. & St. P. R. Co., 147 Minn. 310, 180 N. W. 218	17
McCalmont v. Penn. R. R. Co., 273 Fed. 231	15, 16
Norfolk & Western R. Co. v. Smith, 152 Va. 165, 146 S. E. 268	17
Rambo v. C. G. W. R. R. Co., 263 N. W. 112 (Minn. This case)	1
Rocco v. Lehigh Valley R. Co., 288 U. S. 275, 77 L. Ed. 743	16

Southern R. Co. v. Gray, 241 U. S. 333, 60 L. Ed. 1030.. 15
Southern Ry. Co. v. Youngblood, 286 U. S. 313, 76 L. Ed. 1124, 52 S. C. R. 518..... 16
Unadilla R. Co. v. Caldine, 278 U. S. 139, 73 L. Ed. 224. 15

Statutes.

Page

Federal Boiler Inspection Act, U. S. C. A. Title 45, Sec. 23, Act of June 7, 1924, 335, Sec. 2; 43 Stat. 659..... 2
Federal Employers Liability Act, U. S. C. A. Title 45, Sec. 51, Act of April 22, 1908; 35 Stat. 65..... 3
Sec. 237 (b) of Judicial Code as Amended U. S. C. A. Title 28, Sec. 344-B..... 2

IN THE

Supreme Court of the United States

October Term 1935

CHICAGO GREAT WESTERN RAILROAD COMPANY, a corporation,

Petitioner,

vs.

MARY RAMBO, as administratrix of the Estate of Roy C. RAMBO, deceased,

Respondent.

BRIEF FOR PETITIONER.

B.

OFFICIAL REPORT OF THE OPINION IN THE COURT BELOW.

The opinion of the Supreme Court of Minnesota was filed November 1, 1935, and is reported in 263 N. W. 112. Dissenting opinion of Justice Holt reported in 263 N. W. 114.

C.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked under Section 237(b), of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 28 U. S. C. A., Sec. 344-B; 43 Stat. 937.

(Numbers in parenthesis refer to pages of the Reprinted Record.)

The decision of the Supreme Court of Minnesota was filed on November 1, 1935.

The petition for rehearing was filed on November 7, 1935 (R. 246), and denied on November 14, 1935 (R. 249).

Final Judgment of the Supreme Court of Minnesota was entered November 14, 1935 (R. 249), and the petition for writ of certiorari was presented within ninety (90) days from that date.

In the trial court it was claimed by respondent that the evidence would support a recovery under the provisions of the Federal Boiler Inspection Act, to-wit: U. S. C. A., Title 45, Sec. 23, Act of June 7, 1924, c. 355, Sec. 2, 43 Stat. 659, and under rule 29 of the Interstate Commerce Commission adopted pursuant to the provisions of said act.

The Federal Boiler Inspection Act reads as follows:

> "It shall be unlawful for any carrier to use or to permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof, are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive and its boiler, tender, and all

parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of Sections 28, 29, 30 and 32, and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

And the rule of the Interstate Commerce Commission adopted pursuant to the provisions of said Act, which was relied on by the respondent, reads as follows:

"Locomotives used in road service—Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive, who possesses the usual visual capacity required of locomotive enginemen to see in a clear atmosphere a dark object as large as a man of average size, standing erect, at a distance of at least 800 feet ahead and in front of such headlight, and such headlight must be maintained in good condition."

The respondent also relies on the Federal Employers' Liability Act, to-wit, the Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65, U. S. C. A. Title 45, Sec. 51, reading as follows:

"Every common carrier by railroad, while engaged in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by rea-

son of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

In the trial court it was claimed by the respondent that the evidence would support a recovery under the provisions of said Boiler Inspection Act and the above quoted rule. The trial court so held, and held further that under that act alone could any recovery be sustained. (R. 210). Petitioner denied these claims. Its motion for a directed verdict was denied (R. 208). A verdict for $15,000 was returned for respondent (R. 217), and petitioner's motion for judgment notwithstanding the verdict was denied by the trial court (R. 236-8).

Petitioner appealed to the Supreme Court of Minnesota assigning the foregoing rulings of the trial court as error, and thereby alleging that it had been denied a title, privilege, right or immunity under said act (R. 240). The State Supreme Court affirmed the judgment of the trial court. Its decision was a decision by the highest Court in which a decision might be had in the state.

The decision upon the question whether there was evidence sufficient to sustain a finding that the Federal Boiler Inspection Act had been violated was necessary to a determination of said cause. It was actually decided in the affirmative by the Supreme Court of Minnesota and there was in the case no non-federal ground broad enough to sustain the judgment.

This Court has held that it will examine the record in such a case and if, as a matter of law, the evidence is not sufficient to sustain a finding that the carrier has violated the law, it will reverse the judgment. C. M. St. P. & P. Ry. Co. v. Coogan, 271 U. S. 472, 70 L. ed. 1041.

D.

STATEMENT OF THE CASE.

Deceased, Roy C. Rambo, was a signal maintainer for the Railroad Company stationed at Randolph, Minnesota (R. 9). He was killed on December 8, 1933, at 5:10 p. m. by reason of a locomotive striking the motor car or speeder on which he was riding on the track. He was engaged in interstate commerce (R. 15).

Mr. Rambo had a section of the tracks to look after whereon it was his duty to maintain the electric signals, crossing bells, and telephone (R. 159). He operated a motor car on the track "with the understanding that trains may be run at any time upon any track in either direction" (R. 223). He was also instructed by the rules of the company not to operate his motor car "at night except when necessary", and that "in such cases a white and red light must be displayed, visible from both directions. A red and white lantern must be kept on motor cars ready for use at all time" (R. 227-228). His attention was particularly called to this rule November 13, 1928 (R. 227).

Rambo disobeyed these instructions. He had left his red and white lanterns in his tool house and had no lanterns on his car at the time he was killed (R. 146).

Rambo's hours of work were from 8:00 a. m. to 5:00 p. m. (R. 159). It was his duty to get a line-up of trains at 8:00 a. m. and 1:00 p. m. which were good for one hour only. After that if he made a move it was his duty to get a line-up before doing so (R. 160, 230, 231). It was his duty before going on the track at all "to assure himself that all trains and sections due have passed. No notice will be given of extra trains and employes must protect themselves as prescribed by the rules" (R. 227).

At the time of his death, Mr. Rambo also violated these instructions. He failed to get a line-up on the train that killed him before he started out on the track, although he should have known that it had not passed (R. 171). Passenger train No. 8 was due to pass Hampton going South at 4:12 p. m. It had not passed at 4:55 p. m. At that time the deceased was seen at that station starting his motor car to go South toward Randolph where he lived. There was a telephone in the station at Hampton (R. 92). Rambo was not more than fifteen feet from it (R. 96). He could have communicated instantly with the train dispatcher before he left Hampton. It was his duty to do so. The station agent realizing that he was about to start out and that he had not gotten information as to trains, as it was his duty to do, ran out to warn him, but by the time he got there deceased was on his way (R. 92).

At 5:05 p. m. Train No. 8 passed Hampton 53 minutes late (R. 94). It had been delayed by an earlier mishap. It overtook the motor car travelling ahead of it in the same direction with the fatal result. The engineer testified:

> "I saw something down the track; at first when I noticed it, I thought it was a dog or two running down the track. When I got a little closer I discovered it was a speeder, and I pulled the whistle. I gave a number of short blasts and the man on the speeder never turned or looked" (R. 51).

The train was going 60 miles per hour (R. 51, 55). The engineer tooted the whistle a number of times and set his emergency brake (R. 51-2). The accident happened on a straight track. It was straight for a mile or more before the point where the speeder was struck (R. 53).

The engineer testified that he was looking ahead; that he first saw the car when it was seven to nine car lengths ahead of him (R. 52). He afterwards said it might have been a thousand feet, more or less (R. 175). *He did not say how far ahead he was looking.* There was no evidence from any person in the engine cab that the light would not reveal a person standing erect at a distance of 800 feet if the person's eyes were directed at a point 800 feet ahead.

The only question submitted to the jury as to the negligence of the Railroad Company was whether it had complied with the law with reference to the headlight on the engine (R. 210, fol. 297).

There was no proof whatever offered by plaintiff as to the defective condition of the headlight. It was a standard headlight (R. 126)—a type purchased after a thorough test to see if they complied with the rule of the Interstate Commerce Commission (R. 126-7).

This particular headlight was checked by the chief electrician of the railroad company immediately after the accident and found to comply with the requirements (R. 127-8). The headlight was then burning brightly. There were no spots on it (R. 127). The light as then burning revealed a telegraph pole 1,000 feet ahead of it (R. 128).

The headlight was inspected when the engine arrived at Oelwien, Iowa, and found to be in perfect condition (R. 140). It had not been touched in the meantime. It was inspected before the train left Minneapolis and found to be in perfect condition (R. 136-7).

E.

SPECIFICATION OF THE ASSIGNED ERRORS INTENDED TO BE URGED.

1. The Supreme Court of Minnesota erred in affirming the judgment of the District Court of Dakota County, Minnesota, and thereby holding the evidence in the case sufficient to sustain a recovery for the death of the deceased under the provisions of the Federal Boiler Inspection Act.

2. The Supreme Court of Minnesota erred in affirming the trial district court of Dakota County, Minnesota, which (a) denied petitioner's motion for a directed verdict at the close of the evidence; (b) denied petitioner's motion for judgment notwithstanding the verdict; (c) entered judgment in favor of respondent; (d) charged the jury that the Federal Boiler Inspection Act could be considered in this case and that the petitioner could be found liable thereunder (R. 210-11).

F.

ARGUMENT.

There was no evidence to sustain a finding of the violation of the Federal Boiler Inspection Act where the only evidence of a defective headlight on the engine was the testimony of the engineer that he did not see deceased within 800 feet ahead of the engine, and where the headlight was shown to be in perfect condition before and immediately after the accident.

The rule (R. 211, 219) (Petition p. 3) requires that a locomotive shall, between sunset and sunrise, have a headlight which shall afford sufficient illumination to enable a person in the cab of the locomotive, who possesses the usual visual capacity required of locomotive engineers, to see, in a clear atmosphere, a dark object as large as a man of average size standing erect at a distance of at least 800 feet ahead and in front of such headlight. There was no proof that this headlight did not meet these requirements. Immediately after the accident it was tested by the chief electrician of the petitioner, who happened to be on the train, and it revealed the seventh telegraph pole, over 1000 feet ahead (R. 128). Tested before leaving Minneapolis, it was found in perfect condition (R. 136-7) and was in perfect condition on arrival at Oelwein, Iowa (R. 140).

Because the engineer said that when he first saw the moving object in front of him it might have been seven, eight, or nine car lengths ahead of him (R. 52), or perhaps one thousand feet (R. 175), respondent claimed it could be inferred that the headlight was defective. He could not have known how far it was away when he first saw it because he was on

an engine moving through the darkness at 60 miles per hour, overtaking another object moving in the same direction. His minimum estimate of seven car lengths was manifestly only a guess. It was pure conjecture, whether or not the engineer first saw the speeder in less than 800 feet, but if it was less than 800 feet before he discovered the speeder, no proof is made out of a defective headlight.

The rule requires a headlight that will reveal a man standing erect at a distance of 800 feet. The rule assumes that if both man and engine are standing still, the man should be revealed at 800 feet. If that test is met, the rule is complied with. It is not shown to be violated because the man on the swiftly moving engine did not see the railroad speeder with a man sitting on it and moving in the same direction.

There was no proof that, although the engineer was looking ahead, his eyes were fixed on a point 800 feet ahead. His gaze may have been directed to a point 200 feet in front of the engine or 500 feet in front of the engine, or immediately in front of the engine. To make any proof of a defective headlight, plaintiff must first prove that the engineer's eyes were fixed on a point 800 feet ahead. There was no such proof.

Even if the headlight were as bright as the sun, the engineer would not see an object 800 feet ahead if he were only looking 400 feet ahead. To show that the engineer didn't see 800 feet ahead is no proof that he couldn't see an object that far ahead, had his eyes been directed at a point that far in advance of him. The candle power of the headlight is not determined by proof that the engineer did not see deceased within 800 feet. As a matter of fact, the engineer did not know how far ahead of him the motor car was when he first saw it. He said first seven, eight or nine car lengths and

afterward said it might be a thousand feet (R. 52, 175). Manifestly he would not know. Sitting in the cab of an engine, moving 60 miles per hour, overtaking a motor car likewise in motion, no one could tell how far off it was when first seen. It would be only a guess at the best.

So, not only was it not proven that the engineer could not see 800 feet ahead, had his eyes been directed that far in advance, but it is also so uncertain as to amount to total lack of proof, as to the distance from which the engineer actually discovered the railroad speeder.

Even making the unproven assumption that the engineer's eyes were fixed on a point not less than 800 feet ahead (which is a pre-requisite to any claim that the headlight was proven to be defective), still the proof fails to sustain any claim of a defective headlight.

The test is whether the headlight on a standing engine will disclose a man standing 800 feet ahead. Proof that at a speed of 60 miles per hour, an engineer would not discover a man sitting on a moving speeder, does not show a failure to meet the test because of the dissimilarity of the conditions. Another pre-requisite would be necessary to such proof. It would be necessary to prove that a man on a moving speeder was just as visible an object to a man on a moving train as a man standing erect on the track. The eye does not pick up an object moving away from it at night as quickly as an object standing still. At least the burden was upon the plaintiff to prove that it did. This was not done. Proof of failure to see a moving speeder with a man sitting on it, at 800 feet, is not proof that the headlight would not reveal a man standing erect at that distance, because:

(1) There was no proof that the eyes of the engineer were fixed upon the spot as far ahead as 800 feet, and

(2) There was no proof that the moving speeder with a man sitting on it was as visible as a man standing erect on the track.

To say that this light did not comply with the test is the purest speculation in this case. The respondent wholly failed to prove any violation of the Federal Boiler Inspection Act. Respondent failed to show at what distance a man standing erect could be seen with this light. The rule is not shown to be violated because a moving object, close to the ground, with a man sitting on it, is not seen sooner by an engineer who is not shown to be looking as far as 800 feet ahead.

Respondent claims that the testimony of the witness, Nicholas Schaack, supports the finding of a defective headlight. He was a lad of 15 years (R. 66). He lived on a farm West of the Chicago Great Western Railroad track. He was out in the yard catching chickens (R. 67). He first heard the train (R. 67); then later according to his testimony he heard the speeder (R. 67). He said that when he first saw the motorcar it was about 100 feet ahead of the train (R. 76, fol. 110). Respondent claims that this would support a finding of a defective light. It does not. The boy was off to one side and not beside the light. The track was on the embankment above him (R. 70). He did not watch the train from the time he first saw it until the accident occurred. He looked away from the track toward the cornstalks to see if there was a chicken there (R. 71). When he looked back again he saw the motorcar on the track (R. 79). He was 40 rods from the speeder, below it, and off to one side, but he had no difficulty then in seeing a man on the speeder (R. 76).

The boy never testified at any time that he *could not see* the speeder until the train came within 100 feet of him, the

Supreme Court of Minnesota to the contrary notwithstanding. What he *did* say was that *he did not see* it until the train was within 100 feet. He saw the train, then looked for his chickens, then looked up and saw the man on the motorcar.

Proof of the fact necessary to sustain the verdict requires evidence of a far more substantial character than this. The boy's evidence does not furnish a foundation upon which anyone could hazard a guess as to whether a person in the engine cab could see a man 800 feet ahead.

Again respondent claims that because the fireman testified that the setting of the brakes, the blowing of the whistle, and the collision, all seemed to come together (R. 44) a like conclusion of a defective light may permissibly be drawn. They would all seem to come together. Such speculation cannot be dignified as proof.

Nor can the baseless argument that because the train stopped in 2210 feet and 2170 feet respectively when the brakes were afterward tested, a defective light was shown. That testimony would eliminate the claim that the brakes were defective, but it has nothing whatever to do with the light. The jury was allowed to find a defective light without a scintilla of proof that it was in any respect below the required standard and in the face of petitioner's uncontradicted proof that it was perfect.

II.

Even if the headlight were defective, it was not the proximate cause of the accident.

A train traveling 60 miles per hour strikes a railroad motorcar traveling ahead of it at night. The engineer does not

see the car until it is too late to avoid striking it. The negligence of the engineer is out of the case by the Court's charge. He is not to be found negligent because he did not see the car. He did everything in his power to avoid the accident after he discovered the peril—that is conceded.

The doctrine of last clear chance does not apply in an action of this kind until it appears that the engineer actually saw the deceased and knew of his peril. It conclusively appears that the engineer did everything in his power to avoid the accident.

The claim of negligence is not that the engineer could have seen the deceased sooner [illegible] different light. The claim is that the deceased might have seen a more powerful light and been warned thereby. But of this there is no proof. It is nothing more than surmise. Even if the candle power of the light had been one or two greater, it does not follow logically that the deceased would have been warned thereby, any more than with a weaker light. He was regardless of his own safety. He went out on the track without ascertaining if a train was coming. It was his duty to do so. He did not hear warning blasts of the whistle which were given in plenty of time so that he could have jumped out of the way. "He never turned or looked".

How then can it be assumed that he would have been warned by a little brighter light. Again such conjecture does not reach the dignity of proof.

The uncontradicted proof is that the train would have struck deceased anyway, even if the engineer discovered deceased at a distance of 800 feet. There is no proof that he did not discover him before within 800 feet. But even if he did not, it makes no difference. Just discovering him at 800 feet the train would have struck the motor anyway.

At the speed the train traveled, it could not stop in less than 2,000 feet (R. 183, 184).

III.

The negligence of the deceased employe was the sole proximate cause of his death, and is, therefore, a complete defense under the Federal Act. The question of proximate cause was for the Court.

Unadilla Ry. vs. Caldine, 278 U. S. 139, 73 L. Ed. 224;
Davis vs. Kennedy, 266 U. S. 147, 69 L. Ed. 212;
Frese vs. C. B. & Q. RR. Co., 263 U. S. 1, 68 L. Ed. 131;
G. N. vs. Wiles, 240 U. S. 444, 60 L. Ed. 732;
McCalmont vs. P. R. R. Co., 273 Fed. 231, 283 Fed. 736;
Certiorari denied, 260 U. S. 751, 67 L. Ed. 495;
Southern Ry. vs. Gray, 241 U. S. 333, 60 L. Ed. 1030;
C. M. & St. P. vs. Coogan, 271 U. S. 472, 70 L. Ed. 1041.

That the deceased was negligent was proven beyond any question. He violated the rules. He carried no lanterns. He did not get information as to trains. He did not watch out for trains. He knew it was his duty to keep out of the way.

In Great Northern Railway Co. v. Wiles, supra, a freight train stopped owing to the pulling out of a drawbar—an alleged violation of the Safety Appliance Act. The deceased, in violation of his orders, failed to put out warning signals and was killed when a passenger train crashed into the freight. His violation of the rules and his instructions was the sole cause of his death—even though there was a jury question as to the violation of the Safety Appliance Act.

The Wiles case was followed in Boghich v. Louisville & N. R. Co., 26 Fed. 2d, 361, in which case the proximate cause of the death of the engineer was held to be his own failure to follow his instructions and rules, notwithstanding the headlight of the engine was defective. The failure to furnish a proper headlight did not cause the accident. The deceased caused it by not obeying his rules.

So in the following case, the negligence of the deceased in failing to obey rules was held to be the sole proximate cause, to-wit:

Southern Ry. Co. v. Youngblood, 286 U. S. 313, 76 L. Ed. 1124, 52 Sup. Ct. Rep. 518.

In the McCalmont case, supra, there was a violation of the Safety Appliance Act, but the deceased (as did Rambo) violated his rules by failing to put out signals for his own protection and such failure was held to have been the proximate cause of his death.

The Railroad Company owed deceased no duty to look out for or warn him of the approach of the train. It was his duty to look out for and keep out of the way of the train.

Connelly vs. Penn. R. Co., 228 Fed. 322;
Aerkfetz vs. Humphreys, 145 U. S. 418, 36 L. ed. 758;
Chesapeake & Ohio vs. Nixon, 271 U. S. 218, 70 L. Ed. 914;

The Nixon case was distinguished in

Rocco vs. Lehigh Valley R. Co., 288 U. S. 275, 77 L. Ed. 743,

where (1) the accident happened on a blind curve; (2) the workmen's view was obscured; (3) the train was required to give warning when approaching the curve but failed to do so; and (4) the presence of Rocco on the track at that point should have been expected by the engineer.

In the case of Bernola vs. Penn. R. Co., 68 Fed. (2) 172, a trackman was killed by an extra unscheduled train traveling 50 miles per hour. No signals or warnings were given. The Court, following the general rule and not the exception alluded to in the Rocco case, held that the Railroad Company owed no duty to the deceased to give him any warning; that failure to give any warning whatever of the approach of the train was not negligence; that the proximate cause of the accident was the failure of Bernola to watch for the approach of trains.

See also:

Atlantic Coast Line v. Driggers, 279 U. S. 787, 73 L. Ed. 457, 49 Sup. Ct. Rep. 490.

The decisions in Minnesota fully sustain the argument that it was the duty of deceased to watch for trains; that failure to do so is the proximate cause; that the Company owes no duty to the trackman to warn him. See:

May vs. C. M. & St. P. R. Co., 147 Minn. 310, 180 N. W. 218;

Greisch vs. M. St. P. & S. S. M. R. Co., 160 Minn. 83, 199 N. W. 517.

Decisions of other State Courts are to the same effect:

Dozier vs. Mo. Pac. R. Co., 176 Ark. 651, 3 S. W. (2nd) 678;

Norfolk & W. R. Co. vs. Smith, 152 Va. 165, 146 S. E. 268;

Cincinnati &c. R. Co. vs. Swann, 160 Ky. 458, 169 S. W. 886, L. R. A. 1915C, 27.

There is no proof that a light ten times more powerful would have overcome the effects of the negligence of the de-

ceased. To so find is to base liability upon a mere guess. The negligence of the deceased was the sole proximate cause and defendant is not liable.

IV.

CONCLUSION.

We respectfully submit that this court should reverse the judgment of the Supreme Court of Minnesota, and prohibit a recovery where there is no evidence warranting it, and where the Railroad Company has violated no duty resting upon it, and where the fatal accident resulted solely from the disobedience of orders by the employee.

Respectfully submitted,

HARRY S. STEARNS,
RALPH A. STONE,
PHILIP J. MACKEY,
Attorneys for Petitioner.

WALTER H. JACOBS,
Chicago, Illinois,
of Counsel.